Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 26 of the Cable Television Consumer Protection and Competition Act of 1992	)	PP Docket No. 93-21
	)	
Inquiry Into Sports Programming Migration	)	

To: The Commission

REPLY COMMENTS OF ESPN, INC.

1. Of the initial comments submitted in response to the Further Notice of Inquiry, only those of The Association of Independent Television Stations ("INTV") argue for regulatory intervention to deal with any alleged sports programming migration. Most of INTV's arguments have been advanced before the Commission previously; and most come down in the end to speculation about problems in "the future" (page 18) and about what "will" happen to local stations (page 19), in spite of facts that suggest the contrary. A few specific points do, however, warrant a brief reply.

Major League Baseball

2. INTV's arguments about ESPN's new contract with Major League Baseball ("MLB") are incorrect. The contract does not give ESPN "exclusive rights" to telecast games on Sunday nights (page 6). Rather, like the NFL, MLB has agreed to schedule games on Sunday evenings (when games are otherwise rarely played) in order to enable ESPN to televise games throughout the nation on those evenings. In effect, ESPN's contract has caused MLB to increase output by scheduling games during a time period when there would otherwise be no games and distributing those games to a national audience.

3. Moreover, even on Wednesday nights, when ESPN does have protection against over-the-air telecasts, it is not correct to say that the contract provisions "artificially restrict the supply of televised baseball games" (page 6). In the first place, there is nothing "artificial" about the limited exclusivity provision. To the contrary, the restrictions protect ESPN's audience and thus the value of its programming for advertisers.[1/] ESPN's decision to stop televising games on Mondays, Tuesdays and Fridays -- days on which it did not have any exclusive rights -- demonstrates that exclusivity does not just keep others from televising games but rather is necessary in order to create a product of suffi-

---

1/ This point was explained in the Comments of Capital Cities/ABC, Inc. at 12-15 & n.9 (April 11, 1994).

cient value for advertisers to justify the investment in national telecasts.

4. Further, there is no reason to think that, but for ESPN's exclusivity on Wednesday nights, there would be more local broadcasts. ESPN's contract leaves over-the-air telecasters free to televise major league baseball seven days and six nights a week; and even after taking account of The Baseball Network's arrangement for network telecasts, local stations have substantial opportunities to televise baseball. In all likelihood, especially in light of the growing number of over-the-air networks and the increasing array of programming options available to local stations, local stations already have more opportunities to televise baseball than they need or want.

5. INTV suggests that "surviv[al] in the marketplace" ought to be the test (page 11). We agree. The television arrangements INTV is worried about are those that have survived in the competitive marketplace. There is no reason to interfere with that marketplace, which takes account of the various interests involved, generates "the most efficient" combination of local and national television arrangements (page 11), and has resulted in ever-increasing amounts of sports programming on television.

College Football

6. INTV makes two basic points about college football. First, it asserts that the efficiency justifications for contracts like

ABC's contract with the CFA are "invalid" (page 22). INTV provides no support for that assertion. It quotes dicta from Regents of California v. American Broadcasting Companies, Inc., 747 F.2d 511 (9th Cir. 1984); but that case concerned a different contract, was decided 10 years ago, and held only (by a 2-1 vote) that plaintiff had raised "serious questions" sufficient to justify a preliminary injunction. Id. at 519. The subsequent decision in INTV's own case, Association of Independent Television Stations v. College Football Ass'n, 637 F. Supp. 1289 (W.D. Okla. 1986), recognized the important changes in the industry and took a very different approach. INTV also quotes liberally from an FTC staff brief that was filed at the outset of its litigation in 1990, before discovery; that brief was fully answered by respondents in the case, and its arguments were not adopted by the Administrative Law Judge or the Federal Trade Commission.

7. INTV says that "statistical analysis" shows that college football games have migrated away from over-the-air television (page 26). In fact, however, its statistics are taken from just three, selected cities. In aggregate, INTV's own data show that from 1988 to 1992 (the years chosen by INTV) the number of games televised over-the-air on the networks and "the non-network sector" actually increased from 94 to 109 (page 27).

The First Amendment

8. INTV argues at some length that the Commission need not concern itself with First Amendment considerations in deciding whether to adopt sports siphoning rules (pages 38-43). It reaches that conclusion principally by trying to distinguish Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1979), a case which turned largely on statutory issues. Even as characterized by INTV, the court in HBO struck down the siphoning rules at issue there on the ground that the concern about siphoning was "speculative" and that siphoning posed "no tangible threat to broadcasting" (page 41). Nothing in the record of this proceeding suggests that INTV's predictions of siphoning in the future are other than "speculative" or supports any suggestion that over-the-air telecasters need preferential access to sports events in order to remain viable.

9. In any event, First Amendment considerations are plainly implicated by INTV's request for regulatory intervention. A requirement that colleges and other rights holders must televise their games and their messages on over-the-air stations, or that they cannot televise their games on cable, or that if they choose to televise their games on cable they must also do so over-the-air, would plainly abridge their rights as speakers. See, e.g., Pacific Gas & Elec. Co. v. Public Util. Comm'n, 475 U.S. 1 (1986); Wooley v. Maynard, 430 U.S. 705 (1977) (the government cannot compel someone to speak); Harper & Row Publishers v.

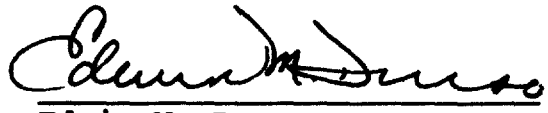
Nation Enterprises, 471 U.S. 539, 559-60 (1985). Imagine, for example, regulations that required a political candidate who wanted to appear on MTV or on Larry King Live to appear instead or in addition on 20/20 or 60 Minutes. Such regulations would infringe, not only the rights of the speakers, but also the rights of telecasters to obtain and disseminate the programming that they and their viewers desire. See, e.g., City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494-94 (1986) (cable operators are protected by First Amendment).

10. Regulations that would restrict the rights of colleges, telecasters and others to make the kinds of television arrangements they desire -- and would do so because of the sports content of the telecasts -- might well be condemned as a form of impermissible, content-based regulation of speech. See City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986). At the very least, even if they were not regarded as content-based, any such regulations would have to satisfy the requirements that they be shown to further an important governmental interest demonstrated by substantial evidence and that they be narrowly drawn

to serve that interest. E.g., United States v. O'Brien, 391 U.S. 367, 377 (1968). The record in this proceeding appears to fall far short of that necessary to meet either of these tests.

Respectfully submitted,

ESPN, Inc.



Edwin M. Durso
Executive Vice President &
General Counsel

ESPN, Inc.
605 Third Avenue
New York, NY 10158-0180
(212) 916-9200

April 26, 1994